United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2581 B

United States Court of Appeals

FOR THE SECOND CIRCUIT

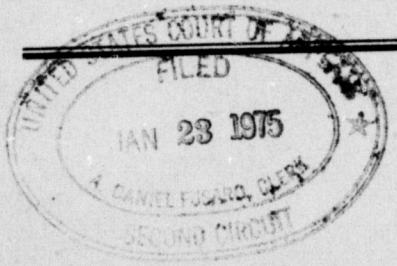
SAUL STEIN, ET ALS

vs.

J. FREDERICK BITZER, CHAIRMAN, ET ALS

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFFS-APPELLANTS
MATHEWS & COVERT



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INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOT, DONALD MATHEWS, and MORTIMER COVERT,
Plaintiffs,

DONALD MATHEWS, MORTIMER COVERT,
Plaintiff-Appellants,

vs.

J. FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERSON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Defendant-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE ISSUES

Are state employees, who successfully established that they were discriminated against by Connecticut retirement laws on account of sex in violation of Title VII of the 1964 Civil Rights Act as amended, precluded by the Eleventh Amendment and *Edelman v. Jordan*, 415 U.S. 651, *reh. den.* 416 U.S. 1000 (1974) from awards of "back pay" monetary relief and of attorneys fees, considering that:

(a) Congressional intent and language clearly authorizes such awards;

(b) Plaintiffs were authorized by Congress to act as private attorneys general in place of the Attorney General of the United States;

(c) The State of Connecticut has consented to such relief by adoption of strong and similar anti-

discrimination laws and by provision in its 1965 constitution — and by ratification of the Thirteenth, Fourteenth & Fifteenth Amendments;

(d) Eleventh Amendment immunity was abrogated in respect to civil rights by the Thirteenth, Fourteenth, & Fifteenth Amendments and enabling legislation such as Title VII enacted thereunder;

(e) Any monetary recovery would be paid from a statutorily established retirement trust fund composed of both employees' contributions and the state's contributions already paid or established in amount; and

(f) Payment of fees in litigation to enforce a strong state and federal social policy, would in any event have only an ancillary effect on the state treasury, as already determined by this Court?

STATEMENT OF THE CASE

This suit was brought as a class action on behalf of all present and retired male employees to enjoin as violative of the 14th Amendment and the Civil Rights Act of 1871 the sexually discriminatory provisions of the Connecticut State Employees Retirement Act. After a three-judge court was convened, the complaint was amended to allege that the Retirement Act violated Title VII of the Civil Rights Act of 1964 as amended in March 1972 to include states, and so the court remanded the case to the single district judge who convened it, to consider the applicability of federal statutory law. On mainly stipulated facts, more fully set forth in the Memorandum of Decision (which is the only part of the record in the Appendix), Judge T. Emmet Clarie found that the Retirement Act essentially granted to women employees having 25 or more years of service the right to retire five years earlier than similarly situated men and further that there were rate benefit differentials in favor of female over male employees with less than 25 years of state service. He held that this

constituted an unlawful employment practice by Connecticut because it discriminated between men and women in regard to fringe benefits and consequently violated Title VII and regulations thereunder. He granted plaintiffs prospective injunctive relief and ordered defendant state officials and their successors to administer the Act without unreasonable sex classifications unfavorable to men.

Plaintiffs, however, also sought monetary damages in the form of recalculated benefits for retired males retroactive to various points in time, the earliest in 1965, as necessary to give them complete relief. They further sought an allowance for reasonable fees for their American Civil Liberties Union attorneys, and the court below found fees totaling $6,275 were fair and reasonable. The court held that monetary and attorneys' fees awards against the state were precluded by the Eleventh Amendment and *Edelman v. Jordan, supra,* since any recovery would come from the public treasury. (Employee contributions and state appropriations are held in trust in the State Retirement Fund pursuant to statutory mandates and contribution formulas.)

Two retired male plaintiffs who receive lower benefits than comparable females have appealed to this Court from Judge Clarie's denial of retrospective retirement benefits and attorney fees. Connecticut has not cross-appealed the basic decision striking down the sexually discriminatory provisions of its retirement laws.

ARGUMENT

SUMMARY: An award of "back pay" monetary damages against a state employer in a Title VII discrimination case is not precluded by the Eleventh Amendment, sovereign immunity, or *Edelman v. Jordan*, 415 U.S. 651, *reh. den.* 416 U.S. 1000 (1974). In amending Title VII in 1972, Congress clearly indicated its purpose to make a state employer subject to the full panoply of federal remedies like any private employer; it expressed this intent in literal language, and even authorized

aggrieved persons to sue discriminatory governmental units as private attorneys general. Furthermore, Connecticut has consented to such suit in a variety of ways — by its adoption of equal employment opportunity and a range of anti-discrimination legislation, akin to federal legislation and expressive of the strong *national* policy to end discrimination; by its constitutional provisions commanding equal protection of the laws and resolution of claims against it according to law, state *or* federal; by its ratification of the Thirteenth, Fourteenth and Fifteenth Amendments. The immunity of a state from suit by individuals was limited by the later enactment of these Civil War Amendments and implementing legislation like Title VII thereunder; such immunity was not intended to cover and is incompatible with "civil rights" and the full range of remedies necessary to enforce these basic rights against any person or governmental agency guilty of discrimination. Under tests set forth in *Edelman* itself, the State consented to be sued and Congress so stated. In any event, Connecticut's treasury is not affected in an impermissible way since any recovery here would be from a retirement *trust* fund consisting of employee contributions and state appropriations already established in amount. At most, an award of attorneys fees to successful Title VII plaintiffs would have only a permissible ancillary effect on the state treasury and is allowed by a recent decision of this Court.

I. In amending in 1972 Title VII of the 1964 Civil Rights Act, Congress clearly indicated its purpose to abrogate any assumed immunity of states to recovery of "back pay", and authorized private attorneys general in place of the Attorney General to obtain full relief, including monetary, in Federal Courts from discriminatory actions of states.

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000e *et. seq.*) in various respects. Most significant to the instant case is that state employees have been brought under the protection of 42 U.S.C. sec. 2000e(a) by defining "person" to include "governments, governmental agencies, [and] political subdivisions". (The term "employer" means a person

engaged in an industry affecting commerce 42 U.S.C. sec. 2000e(b), and it is an "unlawful employment practice" for an employer to discriminate in aspects of employment because of *inter alia*, sex. 42 U.S.C. sec. 2000e-2(a).) Furthermore, among the much more effective prevention and relief provisions added was the following:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may include, *but is not limited to,* reinstatement or hiring of employees, with or without *back pay (payable by the employer* . . . . responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.* Back pay liability shall not accrue from a date *more than two years prior to the filing of a charge with the Commission* . . . ." (Emphasis added) 42 U.S.C. sec. 2000e — 5(g)

The 1972 Amendments to Title VII unmistakably show the purpose of Congress to make it possible for an individual to sue a state in federal court for both prospective injunctive and retrospective monetary relief. At the same time as Congress broadened "employer" to include governments, it added provisions making *all* employers subject to back pay and other equitable relief. It said nothing about excluding governmental units from the monetary aspects of the broad relief it then enacted. Congress could not have been more explicit about subjecting states to such relief in federal courts unless it had said in so many words that its intent was to remove any Eleventh Amendment immunity the states might have in discrimination cases.

Furthermore in amending Title VII, Congress clearly indicated that private enforcement of the Act was a "paramount objective".

> "In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII . . .the private right of action remains an essential means of obtaining judicial enforcement of Title VII. — In such case the private litigant not only redresses his own injury but

> also vindicates the important Congressional policy against discriminatory employment practices." *Alexander v. Gardner - Denver Company*, 415 U.S. 36, 45 (1974).

Thus these 1972 changes represented forceful and complete implementations of Congress' 1964 objective: "In the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a, *et seq*, Congress indicated that it considered the policy against discrimination to be of the highest priority". *Alexander v. Gardner - Denver Company, supra* at 47.

In the instant case the plaintiffs are "private attorneys general" acting instead of the EEOC or Attorney General. Suits by the United States against a state are not barred by the Eleventh Amendment. *Bradley v. School Board of City of Richmond*, 416 U.S., 696 (1974); *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965); and monetary claims against a state or state instrumentality can be pressed by the EEOC or the Attorney General. *Brennan v. State of Iowa*, 494 F.2d 100 (8th Cir. 1974). Thus in this case, following an explicit provision of the 1972 amendments, plaintiffs' claims were referred by the EEOC to the Attorney General of the United States, who rather than bringing suit himself, issued right-to-sue letters to plaintiffs. 42 U.S.C. 2000e-5(f)(1). In view of Congress' clear language and intent, an award of monetary relief necessary to end the effects of discrimination should not depend on who actually brings the suit — whether the Attorney General himself, or, due to mere practical factors like funding, staff, and workload, his designated substitutes, private individuals.

As the District Court's Memorandum of Decision correctly recognizes, all reported cases had upheld EEOC guidelines classifying retirement benefits as fringe benefits of employment which may not be discriminatorily granted on the basis of sex. The State even admitted retirement benefits are fringe benefits under Title VII and EEOC guidelines, and interposed the weakest of arguments against plaintiff's position. The State, however, did not remove this discrimination by remedial legislation. In two successive sessions of the General Assembly (1973 and 1974) bills favorably reported on in com-

mittee subsequently "died" before coming to a vote on the floor. Thus, by continuing to fail to act in conformity with federal law for over two years even in the face of the long pendency of this suit (in which the State also caused over a year's delay in decision) the State not only engaged in unlawful employment practices but also "intentionally" engaged in them in the more reprehensible sense of that word, until the court below acted to end manifest discrimination. Injunctive relief prohibiting future sex discrimination was clearly called for; the court below obliged, and the State did not cross-appeal. Further relief is, however, also necessary to correct the monetary effects of past discrimination. This means a recalculation of benefits for retired male employees either under the "equitable relief" provisions or by close analogy to "back pay".

Leaving aside for the moment the question of the length of the recalculation period prior to the injunctive decree in this case, Congress made its intent explicit by the 1972 amendments: the newly added "employer" — here the State of Connecticut — which intentionally engaged in unlawful employment practices, should be, just as private employers are, subject to a full panoply of federal remedies — which may include up to two years of back pay or any other equitable relief, here recalculation of retirement benefits and payment of the unpaid or underpaid portions. (The total of these payments is unknown, but could amount to hundreds of thousands of dollars depending on the length of the retrospective period.) In short, Congress said in effect that an errant government could be obliged to remedy its past wrongful discrimination *out of the public treasury*. See further discussion in Section IV B.

II. Recent Supreme Court decisions, such as *Edelman v. Jordan*, upholding states' Eleventh Amendment immunity in other situations, do not compel similar results in Title VII Cases.

Against this position defendants claim "sovereign immunity" as embodied in the Eleventh Amendment to the United

States Constitution. In so claiming, defendants (the "State") try to find some comfort from lines of reasoning or some of the principles enunciated in (or perhaps foreclosed from further argument by) the majority opinions in two recent United States Supreme Court cases, *Employees v. Department of Public Health and Welfare,* 411 U.S. 279 (1973) and *Edelman v. Jordan,* 415 U.S. 651, *reh. den.* 416 U.S. 1000 (1974). The *Employees* case held that Congress, by extending to certain state employees coverage under the Fair Labor Standards Act *without* changing a section of that act which provides for suits by employees against their employer and for recovery of liquidated damages in addition to unpaid minimum wages or overtime compensation, did not indicate a purpose to sweep away the constitutional immunity of the states from suit in federal courts by their own citizens or citizens of other states. *Edelman* held that the Eleventh Amendment barred the retroactive payment of welfare benefits found to have been wrongfully withheld and that Illinois did not constructively consent to the suit by participating in certain welfare programs and agreeing to administer federal and state funds in compliance with federal law.

There are, however, significant differences between these cases and the case at bar, and there is no case of which plaintiffs are aware deciding the major question involved in the instant case; i.e., whether the State is immune from, or has consented to, that portion of its employees' suit in federal court under Title VII of the 1964 Civil Rights Act as amended which seeks monetary relief, which *may be* payable in part and indirectly from the public treasury.

Assuming for the moment that "public funds" would be used to pay "recalculated benefits", there are several distinguishing features to Connecticut's claim of immunity from paying past damages from the public treasury:

1. Neither Supreme Court case considered the private attorney general mandate of Title VII. As already indicated, the language and policy of Title VII as amended should cause this case to be treated exactly as if such relief were sought,

as it could have been, in a suit by the Attorney General of the United States.

2. Likewise neither case considered Congressional language or purpose comparable to those in this case. In *Employees*, the Court (Douglas, J.) found "not a word" and would not presume Congress to have acted "silently" in abrogating states' immunity; the purpose of Congress to put "the states on the same footing as other employers is not clear". 411 U.S. at 285. In *Edelman*, on which the Court below primarily relied, the Court (Rehnquist, J.) said, ". . . . in this case the threshold fact of Congressional authorization to sue a class of defendants which literally includes States is wholly absent". 415 U.S. at 672.

3. *Employees* has recently been "overruled" by Congress, and now the FLSA has become like Title VII in giving employees the right to sue states for wages due them under the law. By the "Fair Labor Standards Amendments of 1974", P.L. 93-259, 88 Stat. 55 (May 7, 1974), Congress changed various provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201-219) and removed the exclusion of States and political subdivisions thereof. Now by virtue of Section 6 of the Amendments, Section 203 says in part:

> "(d) 'Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include . . .'" (remainder not relevant)
>
> "(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means —
>
> (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than an individual . . . ."

Congress' clear intent is furthered by Amendment Sec. 6 (d) (1):

> "The second sentence of 16(b) is amended to read as follows: 'Action to recover such liability may be maintained

against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.' "

The amendments to Title VII render Congress' language and intent to subject states to suits by individuals as clear as the FLSA amendments do, indeed clearer considering that the FLSA does not also have the private Attorney General booster of Title VII, and does not confine employees to sue only in federal court as plaintiffs in the instant case had to do. Furthermore, under *tests* set forth in *Edelman* and *Employees*, Connecticut *has* consented to this suit, as discussed in the next two Sections.

III. (A) Public Funds would not be used to pay the monetary relief sought here, but (B) even if they were, Connecticut has consented to such suit by its statutory plans to combat discrimination and/or (C) by a Constitutional provision consenting to suit.

A. Before continuing with the reasons why no state immunity exists in this case, it is appropriate to pause and challenge the determination of the court below that plaintiffs seek payment out of the public treasury. While plaintiffs do not contend that payment would be from the pockets of defendant state officials, any such payment would not be from public coffers either, except at most and only as to a portion, in a future, indirect, indefinite and in any event permissibly "ancillary" way. "Recalculated benefits" would be paid from trust funds held in the Retirement Fund pursuant to Section 5-156 of the Connecticut General Statutes:

"All member contributions and state appropriations shall be held in a separate retirement fund by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements in accordance with the law governing the investment of trust funds as defined in Section 45-88."

Even assuming the State pays into the retirement fund 75% of its current retirement income payout requirements, all these payments first go into what is a trust fund. The

public monies lose their identity as such once they are commingled in the fund with employees' contributions. The public treasury is reduced by state laws requiring actuarial reserve funding of the retirement fund; but the relief sought here and now would come out of this special trust fund. State appropriations in the future are irrelevant. Recalculated benefits would come out of the fund as currently constituted, which contains monies already in trust, and is controlled by the State only as to investments and payout of benefits. If a retired employee were improperly denied benefits, he would sue the Retirement Commission and if successful be paid out of the Retirement Fund, not the state treasury. That each "extra" dollar paid out now could involve a later payment to the fund from the treasury is no answer — and is also incorrect. Future payments from the general treasury into the fund are in accordance with the amortization schedule already established pursuant to 5-156(a), and there is no necessary reason why monetary recovery in this case would result in the State making any further payments into the Fund.

In *Gordenstein v. University of Delaware*, — F. Supp. —; 43 U.S.L.W. 2172 (D. Del. dec. 9/16/74), it was held that a suit by a non-tenured professor against a state university which was financially autonomous although partially funded by state money, was not a suit against the state barred by the 11th Amendment but rather a suit against a person cognizable under 42 U.S.C. 1983. The court noted that the university had the resources to pay any judgment without further action of the legislature and that, although payment of the judgment by it might later increase the demands upon the state's funds, this ancillary effect was insufficient to bring the Amendment into play. The case at bar is stronger; the retirement fund can pay the judgment and there is no showing that as a consequence, increased demands on and payments from the state treasury into the fund would ensue.

B. Even if the court believes the state treasury is involved in more than an "ancillary" way, its indirect or limited monetary involvement should be considered in conjunction with its statutorily implied and constitutionally express consent to

suit in this discrimination case. Connecticut has consented to the retrospective relief sought in this case by the adoption of its Fair Employment Practices Law, Conn. Gen. Stat. 31-122 *et seq.*, and by administration of such laws together with the deferment provisions of Title VII. 42 U.S.C. sec. 2000e-5(d); cf. *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Connecticut has a strong policy to combat discrimination, and Connecticut's laws provide agencies, prohibitions, sanctions and relief much like Title VII — and federal laws in other areas. It is curious therefore for the state to be undermining this policy by saying it agrees with it — except for money due its own discriminated against employees who had to resort to federal court.

There is much more reason — and "overwhelming implication" — to find consent in the area of discrimination than in the welfare laws considered in *Edelman, supra*, 415 U.S. at 673. States do not have to participate in welfare programs but do so in part because of the federal funding incentive. Moreover, the Commerce Clause foundation of Title VII is a stronger constitutional underpinning than the General Welfare Clause basis for social security legislation concerning welfare. In any event, the str ng national policy to end all forms of discrimination, founded in the 13th, 14th, and 15th Amendments, definitely adds a greater foundation. See Section IV, *infra*. Connecticut has in effect embraced this national policy wholeheartedly and without the prod of federal money; and sovereign immunity is incompatible with the fundamental obligation of all governmental units in the United States to treat their citizens equally. Under Connecticut General Statutes 31-122(b & f) "person" and "employer" include the state; under 31-126 employers shall not engage in unfair employment practices, and under 31-127 the relief afforded may include "back pay". Connecticut's determined policy to end all forms of discrimination is further exemplified in its constitution of 1965, Article I, Section 20; and its statutes covering housing and public accommodations, and professional associations (CGS 53-35 & 35a); *state agencies* must guarantee equal employment and perform without discrimination

services, job placement, licensing, educational and vocational programs, and *allocation of state benefits* (which may explicitly cover this case), not permit violation of the public accommodation acts, and cooperate with the Commission on Human Rights and Opportunities in enforcement and educational programs (CGS 4-61 c-j); state contracts must have non-discrimination clauses (4-61d & 4-114a); a Commission on Status of Women has been established (P.A. 73-559) and credit transactions must disregard sex or marital status (P.A. 73-573, sec. 2), *et cetera.*

C. In addition since November 20, 1958 Article 11, section 4 of Connecticut's Constitution has expressly provided "claims against the state *shall be resolved* in such manner as may be provided by law". (Emphasis added.) Prior to that, the Constitution was silent on sovereign immunity; now there is wording which might constitute a waiver of common law sovereign immunity. In a recent, short decision, *The Fidelity Bank, Executor v. Connecticut,* 165 Conn. —, 35 Conn. L.J. No. 39 (Apr., 1974), the state Supreme Court said that this section did not waive sovereign immunity, and that it would take a clear enactment of the legislature to do so. This case, however, had a very narrow setting in Connecticut law and did not consider anti-discrimination statutes, let alone the effect of Article 1, Section 20 of Connecticut's Constitution. Furthermore, the phrase "as may be provided by law", does not say Connecticut law and should not mean Connecticut law exclusively. There is nothing in the above language to exclude federal law, especially where, as in Title VII, Congress has clearly expressed its intention. The laws of the United States are the "law" in Connecticut. ". . . . the United States is not a foreign jurisdiction and its law 'is just as much the law of this state as a statute enacted by our own legislature.' " *Porter v. Katz,* 14 Conn. Supp. 273, 275 (1946); applying *Lapinski v. Copacino,* 131 Conn. 119, 125, 128; 38 A.2d 592 (1944), which cites *Claflin v. Houseman,* 93 U.S. 130, 136 (1876); see Art. VI C1.2, U.S. Const., the Supremacy Clause (p. 1a).

Plaintiffs' claims here are remedied by a federal law to which the states are subject according to the expressed intent

of Congress. Connecticut not only has a similar law but also its own Constitution allows resolutions of claims against it according to applicable federal law. Thus, the consent of Connecticut to all forms of appropriate federal court relief in an anti-discrimination case is apparent.

IV. The immunity of a state from suit conferred by the Eleventh Amendment has been limited by the later enactment of the Thirteenth, Fourteenth and Fifteenth Amendments, even under tests set forth in *Edelman*.

The District Court below, in holding that the Eleventh Amendment to the United States Constitution precluded any award of monetary damages to the successful plaintiffs, relied primarily upon the recent decision of the United States Supreme Court in *Edelman v. Jordan, supra*. Yet it is clear from *Edelman* and a number of its antecedents that the Eleventh Amendment immunity is not absolute. The Court indicated that, notwithstanding the Eleventh Amendment, an action for monetary damages may be maintained if two tests are met, 415 U.S. at 672; see also *Employees of Department of Public Health and Welfare v. Missouri* and *Parden v. Terminal Ry. Co., supra*. First, the states must have consented to the abrogation of the Eleventh Amendment shield and, second, there must be a congressional action which by its literal terms allows action against the states. Both tests are met here.

A. Plaintiffs suggested below, and here strongly submit, that in the vital area of civil rights with which this action is concerned, the Eleventh Amendment has either been abrogated, *pro tanto*, by the subsequently adopted Thirteenth, Fourteenth and Fifteenth Amendments, or, alternatively, by the ratification of those amendments, which constituted a "waiver" by the States of their immunity to the extent of the rights protected by such Amendments. See dissenting opinion of Justice Marshall in *Edelman*, 415 U.S. at 694, note 2. Inasmuch as the post-Civil War Amendments were, by their essential nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those amendments waived to a limited extent their general right not to be sued by a private citizen. Those amendments, together with the

statutes enforcing them, created a panoply of federal rights designed to implement the new national commitment to racial justice. Congress clearly conceived that the Amendments were part of the "basic alteration of our federal system wrought in the reconstruction era" and worked a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum v. Foster*, 407 U.S. 225, 238-239, 242 (1972); *Zwickler v. Koota*, 389 U.S. 241, 245-46 (1967). These changes were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states and were opposed in just that ground. Congressman Edgerton, speaking against the Thirteenth Amendment, argued:

> "Better, sir, for our country, better for man, that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of the Union." Cong. Globe, 39th Cong. 1st Sess. 2987.

Congressman Rogers, opposing the 1866 Civil Rights Bill, the provisions of which were later codified in Section 1 of the Fourteenth Amendment, urged:

> "I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us." Cong. Globe, 39th Cong. 1st Sess. 1122-23.

Congressman Shanklin protested that the Fourteenth Amendment struck down "the reserved rights of the states." Cong. Globe, 39th Cong. 1st Sess. 1865-66. Such objections, however, were to no effect, for such a restriction on state power and sovereignty was precisely the goal of the proponents of these measures who believed that the rights of the states ought not include "the right to defeat the very object for which all government is made . . . to inflict wrongs on free

citizens by a denial of the full protection of the laws." Cong. Globe, 42nd Cong. 1st Sess. 84-85 App. (Remarks of Congressman Bingham). Thus, the Civil War Amendments created precisely the circumstance in which immunity had no place, by stripping the states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of the laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have no authority the exercise of which can be protected from litigation, and in such cases the purpose underlying the Eleventh Amendment cannot be served.

Likewise, the existence of a sovereign immunity defense, to the extent it differs from Eleventh Amendment immunity, not only was restricted because of the federal question provisions of Article III (see *Cohens v. Virginia*, 19 U.S. 264 (1821)), but also is manifestly incompatible with the purpose and background of the Civil War Amendments. That defense is founded upon the theory that a citizen with a claim against a state could rely on the legislature's good faith and sense of public duty. *Chisholm v. Georgia*, 2 U.S. 419, 445-6 (1793). Yet, at the time of the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and enabling legislation thereunder, history had shown that such reliance was misplaced. As Congressman Bingham detailed, in support of the 1871 Civil Rights Act,

> "The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and *he had no remedy*. They took property without compensation, and *he had no remedy*. They restricted the freedom of the press, and *he had no remedy*. They restricted the freedom of speech, and *he had no remedy*. They restricted the rights of conscience, and *he had no remedy*. They bought and sold men *who had no remedy*." Cong. Globe, 42nd Cong. 1st Sess. 85 App. (Emphasis added.)

It cannot plausibly be urged that Congress first established a panoply of federal rights and remedies on the ground that the states *would not* voluntarily protect those rights, and yet in-

tended to permit the states to avoid judicial enforcement of those rights on the grounds that the states *would* voluntarily protect such rights and that judicial enforcement was thus unnecessary. It was to create such a federal remedy for the aggrieved citizen (as contrasted with the Attorney General) that the Civil War Amendments and their implementing legislation were enacted. See *Monroe v. Pape*, 365 U.S. 167 (1961). (Connecticut ratified these three amendments on May 4, 1865, June 30, 1866, and May 19, 1869 respectively.)

The Supreme Court has long recognized the enormous impact of these amendments on state sovereignty. In *Ex parte Virginia*, 100 U.S. 339 (1879), a state judge, imprisoned for violating Sec. 4 of the Civil Rights Act of March 1, 1875 (forbidding discrimination on the grounds of race, national origin, and previous condition of servitude in state and federal jury selection), sought a writ of habeas corpus, charging that the statute was an unconstitutional interference with state power to administer its judicial system. The Court rejected this argument entirely:

> "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." 100 U.S. at 346.
>
> "[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment.
>
> It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Id.* at 347-348.

See also *Prout v. Starr*, 188 U.S. 537, 543 (1903) which indicated the inapplicability of the Eleventh Amendment when state enactments disregarded the Fourteenth.

It is submitted that it was clearly the intent of Congress, in passing the Thirteenth, Fourteenth and Fifteenth Amend-

ments, to abrogate in a limited area the immunity of the states from private suits, that the states were fully cognizant of that intent, and that in ratifying those amendments the states effected a limited waiver of that immunity. The States consented to suits seeking all remedies appropriate and necessary, whether retrospective or prospective, to recognized "civil rights".

B. The second test established by *Edelman* is whether there has been congressional action which by its literal terms allows suits against the state. The authority for such legislation is clearly set forth in the final section of each of the three Civil War Amendments, viz: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article". In enacting the 1972 amendments which extended the provisions of Civil Rights Act of 1964 to, *inter alia*, the employees of state and local governments, both houses of Congress specifically premised their action on the Civil War Amendments, as well as the Commerce Clause. In the Senate:

> The last sentence of the 14th Amendment, enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. The inclusion of State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country. S. Rep. No. 415, 92d Cong., 1st Sess. II (1971).

And in the House:

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.
>
> Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes

> that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983. H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971).

Having made clear its intent to apply its authority under the Civil Rights amendments, Congress in the 1972 amendments to Title VII erased virtually every distinction between a state as an employer and any private employer. As indicated in Section I they are treated identically in the basic definitional section of Title VII, 42 U.S.C. 2000e, and consequently receive substantially identical treatment throughout. While the enforcement procedures with respect to states are somewhat different insofar as enforcement by the United States or an officer thereof is concerned, 42 U.S.C. 2000e-5(f)(1), upon the failure of the United States timely to seek enforcement, the right to redress afforded the aggrieved party is the same whatever the nature of the respondent. 42 U.S.C. 2000e-5(f) and (g). Had Congress wished to continue the dichotomy in those provisions of section 2000e-5 allowing suits by an aggrieved party, it surely would have continued the disparity of treatment established under those immediately preceding provisions dealing with enforcement by the United States. That it did not continue the dichotomy is a clear indication that Congress intended the same remedies to be available in an action against a state by an individual as would be available to that individual in an action against a non-governmental employer.

Furthermore a literal reading of 42 U.S.C. 2000e-5 (g) allows monetary remedies in an action against a state. Thus, not only is the intent of Congress to abrogate the immunity of states explicit from a literal reading of the 1972 amendments to Title VII, but also as the structuring of the amendments establishes, it may not plausibly be argued that any reading other than a literal one of those amendments will satisfy the Congressional intent. Thus the two tests of

Edelman are satisfied, and monetary damages in a Title VII action against the state should be recoverable.

V. The recalculation of benefits should be for a period extending prior to the 1972 amendments to Title VII.

Any recalculation of benefits should extend back for a period of time prior to the court decree. Plaintiffs claim that the period should be (1) at least to March 24, 1972, the date of the amendments to Title VII making the State an employer; (2) preferably to January 25, 1971 which is two years prior to the first filing by plaintiff of an EEOC complaint, by analogy of "other equitable relief" to the two year back pay limitation; and (3) best of all, for some period of time prior to that but not beyond July 2, 1965, the effective date of Title VII, on the basis that the two year limitation only applies to back pay as such but does not restrict the period of time for which appropriate equitable relief could be decreed to remedy the effects of past discrimination.

Both 2 and 3 are grounded on any or all of the following claims: (a) the male state employees had a basic right under the 14th Amendment not to be discriminated against (*Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973)) prior to the statutory rights afforded them on March 24, 1972, so the remedy can now be applied even prior to that date; (b) some prior exemptions in Title VII were ended in 1972 when relief was extended; and (c) Congress could easily have excluded the award of any monetary relief against a government prior to that date by simply so stating, but instead it merely put a two year limitation on back pay, with the obvious intent that such an award could be retroactive to March 25, 1970 if an EEOC complaint were filed right on March 24, 1972. In essence, Congress intended to afford relief prior to the date of Title VII protection was extended to state employees, so consequently there can be retrospective application of the remedy, even prior to March, 1972.

In the analogous situation of the 1972 extension of Title VII to federal employees, two Courts of Appeal have recently reached different results in regard to complaints of racial

discrimination filed before the effective date of the act and pending administratively at that time. *Koger v. Ball*, 497 F.2d 702 (4th Cir., 1974—suit not barred) and *Place v. Weinberger*, 497 F.2d 412 (6th Cir., 1974)—suit barred). See also, *Chambers v. United States*, 451 F.2d 1045 (Ct. Cl., 1971) and *Allison v. United States*, 451 F.2d 1035 (Ct. Cl., 1971) in which it was held that a cause of action lay against the federal government for acts of racial discrimination occurring prior to the extension of Title VII to federal employees by P.L. 92-261, and back pay was awarded from the date of discrimination.

VI. An award of attorneys fees to successful plaintiffs is mandated by Title VII and a recent decision of this Court holding the 11th Amendment not to be a barrier.

The Court below found that plaintiffs' attorneys fees requested were fair and reasonable in amount, but held that the 11th Amendment barred their award. In the process, *Jordan v. Fusari*, 496 F.2d 646, 651 (2nd Cir., 1974) was distinguished. Then on October 10, 1974, in *Class v. Norton*, — F.2d —, (No. 74-1702) this Court reaffirmed its statement in *Jordan* and held that the 11th Amendment did not preclude an award of costs and attorneys fees. The matter is thus settled in this Circuit in favor of plaintiffs, who also note that the delay and failure of the State legislature to eliminate the sex discrimination present in this case is analogous to the obstinancy or bad faith noted in *Class*.

Subsequently, *Boston Chapter, NAACP, Inc. v. Beecher*, — F.2d —, 43 U.S.L.W. 2228 (1st Cir. Nov. 8, 1974) held that the 11th Amendment does not immunize the state from being taxed for the costs of its unsuccessful appeal of a district court decision. And *Moore v. Townsend*, — F. Supp. —, PH Eq. Opp. in Housing Rptr. ¶ 13,684 (N.D. Ill., October 25, 1974), made an award of attorneys fees to successful plaintiffs in a suit under the Fair Housing Act even though counsel was furnished to plaintiffs by a public interest group. The court, as did this Court in a footnote in *Class*, approvingly cited *Brandenburger v. Thompson*, 494 F.2d 885, 888, 889 (9th Cir., 1974), which utilized a private attorney general

theory for a fee award where counsel was provided, as in this case, by the American Civil Liberties Union.

Thus, even if this court holds that the 11th Amendment precludes a retroactivity award, plaintiffs' counsel are entitled by the precedent and the better reasoning of this Court, and by 42 U.S.C. 2000e-5(k), to an award of $6,275 fees, which the court below has already found to be reasonable.

CONCLUSION

The holdings of the District Court denying monetary relief to retired plaintiffs and fees to their attorneys should be reversed for the reasons stated. This case should be remanded with directions to the court to order the defendants and their successors:

(a) to calculate and pay any unpaid retirement benefits to all former male employees of the State of Connecticut retired or eligible for retirement salaries on September 16, 1974, retroactive to July 2, 1965; and

(b) to pay plaintiffs' attorneys fees of $6,275 together with such further amount as the court may determine is fair for the conduct of this appeal, and costs.

Respectfully submitted,

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ADDENDUM

UNITED STATES CONSTITUTION

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONSTITUTION (Amendment XIV)

. . . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

FEDERAL STATUTES

42 U.S.C. § 2000e*

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

. . . . .

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivi-

* 1972 amendments made by P,L. 92-261 underlined.

FEDERAL STATUTES (42 U.S.C. § 2000e (f))

sion of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e-2*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . .

42 U.S.C. § 2000e-5*

. . . . .

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

. . . . .

* 1972 amendments underlined

FEDERAL STATUTES (42 U.S.C. § e-5 (f)(1))*

. . . . .

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* 1972 amendments underlined

FEDERAL STATUTES (42 U.S.C. § 2000e-5 (f)(2))*

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

* 1972 amendments underlined

FEDERAL STATUTES (42 U.S.C. § 2000e-5 (g))*

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

. . . . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CONNECTICUT CONSTITUTION

Article I, Section 20

No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.

* 1972 amendments underlined

CONNECTICUT CONSTITUTION (Art. II, Sec. 4)

Article II, Section 4

Claims against the state shall be resolved in such manner as may be provided by law.

CONNECTICUT STATUTES

§ 4–61c. Guarantee of equal employment practices by state agencies

(a) State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race, color, religious creed, sex, age, national origin, ancestry or physical disability, including but not limited to, blindness unless it is shown by such state officials or supervisory personnel that such disability prevents performance of the work involved.

(b) All state agencies shall promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state government. They shall regularly review their personnel practices to assure compliance. They shall conduct continuing orientation and training programs with emphasis on human relations and fair employment practices. The state personnel commissioner shall insure that the entire examination process, including qualifications appraisal, is free from bias.

(c) Appointing authorities shall exercise care to insure utilization of minority group persons.

§ 4–61d. Activities of state agencies to be performed without discrimination. State contracts

(a) All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, age, national origin, ancestry or physical disability, including, but not limited to, blindness. No state facility shall be used in the furtherance of any discriminatory practice, nor shall any state agency become a party to any agreement, arrangement or plan which has the effect of sanctioning discriminatory practices. Each state agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of sections 4–61c to 4–61*l*, inclusive, and shall initiate comprehensive programs to remedy any defect found to exist.

(b) Every state contract or subcontract for construction on public buildings or for other public work or for goods and services shall conform to the intent of section 4–114a of the general statutes.

§ 4–61e. Discrimination in job placement by state agencies prohibited

(a) All state agencies, including educational institutions, which provide employment referrals or placement services to public or private employers, shall accept job orders on a fair practice basis. Any job request indicating an intention to exclude any person because of race, color, religious creed, sex, age, national origin, ancestry, or physical disability, including, but not limited to, blindness shall be rejected, unless it is shown by such public or private employers that such disability prevents performance of the work involved.

CONNECTICUT STATUTES (C.G.S. § 4-61e (b))

(b) All state agencies shall cooperate in programs developed by the commission on human rights and opportunities initiated for the purpose of broadening the base for job recruitment and shall further cooperate with all employers and unions providing such programs.

(c) The department of labor shall encourage and enforce employers and labor unions, to comply with the policy of sections 4-61c to 4-61*l*, inclusive, and promote equal employment opportunities.

§ 4-61f. Discrimination in state licensing and charter procedures prohibited

No state department, board or agency shall grant, deny or revoke the license or charter of any person on the grounds of race, color, religious creed, sex, age, national origin, ancestry, or physical disability including, but not limited to, blindness, unless it is shown by such state department, board or agency that such disability prevents performance of the work involved. Each state agency shall take such appropriate action in the exercise of its licensing or regulatory power as will assure equal treatment of all persons and eliminate discrimination and enforce compliance with the policy of sections 4-61c to 4-61*l*, inclusive.

§ 4-61g. State agencies not to permit violation of public accommodations act

No state department, board or agency shall permit any violation of the public accommodations act.

§ 4-61h. Educational and vocational programs to be conducted without discrimination

All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state agencies, or in which state agencies participate, shall be open to all qualified persons, without regard to race, color, religious creed, sex, age, national origin, ancestry, or physical disability, including, but not limited to, blindness. Such programs shall be conducted to encourage the fullest development of the interests, aptitudes, skills, and capacities of all students and trainees, with special attention to the problems of culturally deprived, educationally handicapped, economically disadvantaged, or physically disabled, including, but not limited to, blind persons. Expansion of training opportunities under these programs shall be encouraged to provide involving larger numbers of participants from those segments of the labor force where the need for upgrading levels of skill is greatest.

§ 4-61i. Discrimination prohibited in allocation of state benefits

Race, color, religious creed, sex, age, national origin, ancestry, or physical disability, including, but not limited to, blindness shall not be considered as limiting factors in state-administered programs involving the distribution of funds to qualify applicants for benefits authorized by law; nor shall state agencies provide grants, loans or other financial assistance to public agencies, private institutions or organizations which engage in discriminatory practices.

CONNECTICUT STATUTES (C.G.S. § 4-61j)

§ 4–61j. Cooperation with commission on human rights and opportunities by state agencies

All state agencies shall cooperate with the commission on human rights and opportunities in their enforcement and educational programs. They shall comply with the commission's request for information concerning practices inconsistent with the state policy against discrimination and shall consider its recommendations for effectuating and implementing that policy. The commission on human rights and opportunities shall continue to augment its enforcement and education programs which seek to eliminate all discrimination.

§ 5–156. Retirement fund

All member contributions and state appropriations shall be held in a separate retirement fund by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements in accordance with the law governing the investment of trust funds as defined in section 45–88.

§ 5–156a. Funding of retirement system on actuarial reserve basis

(a) The state employees' retirement system shall be funded on an actuarial reserve basis. The retirement commission shall, on or before March first, annually certify to the general assembly the amount necessary on the basis of an actuarial determination to gradually establish and subsequently maintain the retirement fund on such determined actuarial reserve basis, and make such other recommendations with regard to such fund and its administration as the commission deems appropriate. The retirement commission shall, at least once every three years, prepare a valuation of the assets and liabilities of the system. On the basis of each such valuation, it shall redetermine the normal rate of contribution and, until it is amortized, the unfunded past service liability. The general assembly shall review the commission's recommendations and certification and shall appropriate to the retirement fund the amount certified by the retirement commission as necessary provided said certification is in compliance with this section.

(b) The retirement commission shall determine on an actuarial basis (1) a normal rate of contribution which the state shall be required to make into the retirement fund in order to meet the actuarial cost of current service and (2) the unfunded past service liability. For the first fifteen years, the funding program for the actuarial reserve basis shall consist of the following percentages of the sum of normal cost and the amount required for a forty-year amortization of unfunded liabilities:

CONNECTICUT STATUTES (C.G.S. § 5-156a(b))

Fiscal year	Percentage to be paid of normal cost plus full 40-year amortization from the beginning of such fiscal year
Beginning 7-1-71	30%
" 7-1-72	35
" 7-1-73	40
" 7-1-74	45
" 7-1-75	50
" 7-1-76	55
" 7-1-77	60
" 7-1-78	65
" 7-1-79	70
" 7-1-80	75
" 7-1-81	80
" 7-1-82	85
" 7-1-83	90
" 7-1-84	95
" 7-1-85	100

provided the state payments shall not be less than seventy-five per cent of the total retirement income payments for each fiscal year commencing July 1, 1973; and for each of the fiscal years ending June 30, 1972, and June 30, 1973, respectively, shall be seventy per cent of the total retirement income payments.

(c) Transfer of appropriated amounts from the general fund and the applicable special funds to the retirement fund shall be made in equal monthly payments during the fiscal year.

(d) No act liberalizing the benefits of the plan shall be enacted by the general assembly until the assembly has requested and received from the retirement commission a certification of the cost of such change under the actuarial funding basis adopted by section 5-154 and this section using full normal cost plus forty-year amortization.

§ 31-122. Definitions

When used in this chapter,

(b) "person" means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers and the state and all political subdivisions and agencies thereof;

(f) "employer" includes the state and all political subdivisions thereof and means any person or employer with three or more persons in his employ.

CONNECTICUT STATUTES (C.G.S. § 31-126)

§ 31-126. Unfair employment practices

It shall be an unfair employment practice

(a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment;

(b) for any employment agency, except in the case of a bona fide occupational qualification or need, to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, any individual because of his race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness;

(c) for a labor organization, because of the race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based on a bona fide occupational qualification;

(d) for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any unfair employment practice or because he has filed a complaint or testified or assisted in any proceeding under section 31-127;

(e) for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts herein declared to be unfair employment practices or to attempt to do so;

(f) for any employer, employment agency, labor organization or person, except in the case of a bona fide occupational qualification or need, to advertise employment opportunities in such a manner as to restrict such employment so as to discriminate against individuals because of their race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness.

(g) for an employer, by himself or his agent,

(i) to terminate a woman's employment because of her pregnancy or

(ii) to refuse to grant to said employee a reasonable leave of absence for disability resulting from such pregnancy or

(iii) to deny to said employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by said employer. Upon signifying her intent to return, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

The provisions of this section as to age shall not apply to

(1) termination of employment where the employee is thereupon entitled to benefits under the terms or conditions of any bona fide retirement or pension plan or collective bargaining agreement between the employer and a bona fide labor organization,

(2) operation of the terms or conditions of any bona fide retirement or pension plan,

(3) operation of the terms or conditions of any bona fide group or employee insurance plan or

(4) operation of any bona fide apprenticeship system or plan.

CONNECTICUT STATUTES (C.G.S. § 31-127)

§ 31-127. Procedure

Any person claiming to be aggrieved by an alleged unfair employment practice may, by himself or his attorney, make, sign and file with the commission a complaint in writing under oath, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unfair employment practice, and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, whenever it has reason to believe that any person has been engaged or is engaged in an unfair employment practice, may issue a complaint. Any employer whose employees, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath asking for assistance by conciliation or other remedial action. After the filing of any complaint, the chairman of the commission shall refer the same to a commissioner or investigator to make prompt preliminary investigation of such complaint and, if such commissioner or investigator determines after such preliminary investigation that there is reasonable cause for believing that an unfair employment practice has been or is being committed as alleged in such complaint he shall immediately endeavor to eliminate the unfair employment practice complained of by conference, conciliation and persuasion. In the conduct of such investigation the commission may issue subpoenas requiring the production of employment records relating to the complaint under investigation. No commissioner or investigator shall disclose what has occurred in the course of such endeavors, provided the commission may publish the facts in the case and any complaint which has been dismissed and the terms of conciliation when a complaint has been adjusted. In case of failure to eliminate such practice, the investigator or investigating commissioner shall certify the complaint and the results of his investigation to the chairman of the commission and to the attorney general. The chairman of the commission shall thereupon appoint a hearing tribunal of one member of the commission or one hearing examiner to hear such complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as the respondent, to answer the charges of such complaint at a hearing before such tribunal, at a time and place to be specified in such notice. The place of any such hearing may be the office of the commission or another place desig-

nated by it. The case in support of the complaint shall be presented at the hearing by the attorney general, who shall be counsel for the commission, or the counsel appointed under the provisions of section 31-125a, as the case may be; and no commissioner who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. Any endeavors or negotiations for conciliation shall not be received in evidence. The respondent may file a written answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The tribunal conducting any hearing may permit reasonable amendment to any complaint or answer and the testimony taken at such hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence, the tribunal finds that a respondent has engaged in any unfair employment practice, it shall state its findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice and further requiring such respondent to take such affirmative action, including, but not limited to, hiring or reinstatement of employees, with or without back pay, or restoration to membership in any respondent labor organization, as in the judgment of the tribunal will effectuate the purpose of this chapter. If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair employment practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination.

§ 53-35. Discrimination in public accommodations, rental housing and commercial property, sale of building lots, mobile home parks.

(a) All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed, color, national origin, ancestry, or sex, or physical disability, including, but not limited to, blindness of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed, color, national origin, ancestry or sex or physical disability, including, but not limited to, blindness

CONNECTICUT STATUTES (C.G.S. § 53-35(a))

shall be a violation of this section. A place of public accommodation, resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation, commercial property or building lot, on which it is intended that a housing accommodation or commercial building will be constructed, offered for sale or rent, and mobile home parks as defined in section 1 of number 186 of the public acts of 1972, provided the provisions of this section shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of his family reside in one of such housing accommodations, or (2) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation, or by the owner of the housing accommodation and he or members of his family reside in such housing accommodation. The provisions of this section, with respect to the prohibition of sex discrimination, shall not apply to the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex.

(b) Nothing in this section shall require any person to modify his property in any way or provide a higher degree of care for a physically disabled person, including, but not limited to blind persons, than for a person not physically disabled.

(c) Any blind person shall be entitled to full and equal access to all places of public accommodation, resort or amusement as defined by this section, accompanied by his guide dog, and he may keep such dog with him at all times in such place of public accommodation, resort or amusement at no extra charge: provided, such dog shall be in the direct custody of such blind person and shall be wearing a harness. Such blind person shall be liable for any damage done to the premises or facilities by such dog.

(d) Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days or both.

(e) This section shall not apply to proceedings pending before the civil rights commission or in any court on October 1, 1963.

§ 53–35a. Discrimination in associations of professional or other licensed persons

Any association, board or other organization the principal purpose of which is the furtherance of the professional or occupational interests of its members, whose profession, trade or occupation requires a state license, which refuses to accept a person as a member of such association, board or organization because of his race, national origin, creed, sex or color shall be fined not less than one hundred dollars nor more than five hundred dollars.